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No. 07-1354

In The
Supreme Court of the United States

MICHAEL J. BUDD,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITIONER'S REPLY BRIEF

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REPLY BRIEF IN OPPOSITION

The Respondents principal argument is that the jury instructions and evidence at trial left the factual allegations of the indictment unchanged. Opp. at 8-9. However, an indictment for violating 18 U.S.C. § 242 requires an allegation that the Petitioner deprived the victim a right secured by the Constitution. *U.S. v. Lanier*, 520 U.S. 259, 264 (1997). The Indictment states that the constitutional right violated in Counts 2, 3 and 4 is "the right to Due Process of law under the Constitution, which includes the right to be free from excessive force amounting to punishment." Pet. App. 57a-59a.

However, the district court instructed the jury that "[b]ecause of the inmates' different status at the time of the alleged incidents you must consider the Fourteenth Amendment" in connection with counts 2 and 4, and the "Eighth Amendment" for count 3. C.A App. 779. The jury was instructed in counts 2 and 4 that the due process clause "protects a pretrial detainee from the use of excessive force that amounts to punishment." C.A. App. 780. The jury had to determine if the Petitioner "used excessive force which amounted to punishment." *Id.* The jury was instructed in count 3 that the "Eighth Amendment" protects inmate Brandon Moore from being "subjected to unnecessary and wanton infliction of pain." C.A. App. 781. The jury was instructed to determine if the Petitioner "unnecessarily and wantonly inflicted pain on Brandon Moore." *Id.*

The jury instructions changed the constitutional element violated in count 3 from that presented to the

Grand Jury. The jury instructions changed the text of the Indictment. This forced the "defendant to be tried on charges that are not made in the indictment against him." *Stirone v. United States*, 361 U.S. 212, 217 (1960). The amendment is apparent by comparing the indictment with the jury instructions.

The Respondent wrongly argues that the Petitioner is not prejudiced. Opp. at 14. The Respondent speculates as to whether the Grand Jury would have returned the Indictment on Count 3 if it had been made aware that the violation was "unnecessary and wanton infliction of pain" instead of "excessive force that amounts to punishment." However, the Respondents "subsequent guess as to what was in the minds of the grand jury at the time they returned the indictment would deprive the [Petitioner] of a basic protection which the guaranty of the intervention of a grand jury was designed to secure." *United States v. Russell* 369 U.S. 749, 770 (1962) (citations omitted).

The Respondent wrongly claims that there was no constructive amendment because the due process language is broad enough to encompass the Eighth Amendment standard. Opp. at 9. The jury instructions are different for the Fourteenth Amendment violation (counts 2, 4) then the Eight Amendment violation (count 3). If a Fourteenth Amendment violation includes an Eighth Amendment violation, as the Respondent argues, then the jury instructions should not have changed. Judge Cook correctly explained in her dissent that "no grand jury passed on the essential description of the crime that ultimately formed the basis for conviction, a circumstance that contravenes the Fifth Amendment." Pet. App. 32a.

The Respondent also wrongly argues that "this is not a case in which the prosecution switched legal theories to gain a tactical advantage." Opp. at 16. Judge Cook correctly explained in dissent that "after the government secured an indictment premised on a Fourteenth Amendment deprivation, it switched theories and tried the case--jury instructions and all--based on an Eighth Amendment deprivation." Pet. App. 35a. The factual predicate presented to the Grand Jury that Petitioner violated "the right to be free from excessive force amounting to punishment" is clearly not the same as the Eighth Amendment violation to be free from "unnecessary and wanton infliction of pain."

The Grand Jury charged a Fourteenth Amendment violation, and the jury instructions charged an Eighth Amendment violation. It is quite possible that the Eighth Amendment violation was not intended by the Grand Jury, after all, a violation of the Eighth Amendment requires a more difficult burden for Respondents.

Even the Respondent conceded in their sentencing memorandum that "the actual injury to Easterly was not serious." C.A. App. 587. Since the conduct towards inmate Brandon Moore (count 2) was substantially greater than that injuries to inmate Easterly (count 3) it is more than hypothetical that the Grand Jury may not have returned the Indictment as to Count 3 if informed that the conduct included the Eighth Amendment violation which is more differential to the Petitioner. This is extremely relevant because Inmate Moore did not testify before the Grand Jury, he was not even interviewed by the FBI until six weeks after the Grand Jury returned the indictment and after the

Petitioners arrest.[1] It is more than theoretical that the Grand Jury could have concluded that the injuries towards Inmate Moore did not amount to "unnecessary and wanton infliction of pain."

The Respondent echoes the majority decision which basically makes the Fifth Amendment Grand Jury guarantee a dead letter. Opp. at 8. However, even the majority opinion candidly recognizes that distinguishing between a constructive amendment from a mere variance is difficult, and that "our precedent in this area may not be easy to follow." Pet. App. 5a fn 2. Judge Cook similarly confirmed in her dissent that "this topic has troubled this court for years." Pet. App. 31a. Other Sixth Circuit decisions confirm the confusion. "[T]he distinction between a variance and a constructive amendment is sketchy." *United States v. Chilingirian*, 280 F.3d 704, 712 (6th Cir. 2002). "[T]he distinction between a variance and a constructive amendment is at best 'shadowy. . . .'" *United States v. Hathaway*, 798 F.2d 902, 910 (6th Cir. 1986).

The Respondent misstates the record with the argument that it "was *petitioner* who initially requested the Eighth Amendment instruction." Opp. at

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[1] The FBI Agent in charge, confirmed that the victim, Brandon Moore did not testify before the Grand Jury, and that the Petitioner "was indicted [six weeks] prior to" the FBI "interviewing inmate Moore." C.A. App. 727. The Petitioner was indicted and arrested six weeks before the victim in Count 3 was interviewed. The Indictment was filed on October 8, 2004. C.A. App. 21. Brandon Moore was interviewed on November 22, 2004. C.A. App. 725-27.

16. During the first trial, the Petitioner filed a motion for judgment of acquittal arguing that Count 3 amended the indictment. C.A. App. 196-197. The Court denied the motion and instead allowed Count 3 to proceed "as an Eighth Amendment violation." C.A. App. 684. The Petitioner argued that he was indicted "under the Fourteenth, but the actual provision is the Eighth" therefore "that count should fail." C.A. App. 711. The Court held: "we need to instruct the jury on the Eighth Amendment." C.A. App. 713. The Petitioner repeated that he was "asking for Count 3 to fall." C.A. App. 714.

Before the retrial, the Petitioner made a motion "to dismiss the charges in Count 3 of the Indictment." C.A. App. 312-322. The Court denied the motion, C.A. App. 361-64. The Petitioner made an oral motion for judgment of acquittal which was denied. C.A. App. 1821. After conviction, the Petitioner filed a motion for judgment of acquittal again arguing the same issue. C.A. App. 442-49. The Petitioner repeatedly sought to have Count 3 dismissed. The Petitioner did not acquiesce to the trial courts ruling that the text of Indictment for Count 3 allowed the jury to be instructed to an Eighth Amendment violation where a Fourteenth Amendment violation was charged.

Lastly, the Respondent's argues that Petitioner did not use force "for the legitimate purpose of maintaining or restoring order." Opp. at 10. However, the "subjective motivations of the individual officers are of central importance in deciding whether force used against a convicted prisoner violates the Eighth Amendment." *Graham v. Connor*, 490 U.S. 386, 398 (1989). The Respondent successfully prevented the

admission of testimony at trial including testimony that the trial judge ordered Petitioner to keep control during the sentencing of Brandon Moore for a brutal gang rape. C.A. App. 379-82, 1066-78. Testimony that Brandon Moore tried to escape during the trial. *Id.* Testimony of "Mr. Moore's demeanor during his sentencing, his comments to the victim's family." C.A. App. 1070. Testimony that the victim spoke at the sentencing and that someone from the victims family said he was going to kill Mr. Moore, and someone from the Mr. Moore's family responded with over my dead body. *Id.* The combined events, the prior attempted escape, the call that morning of an attempted escape, the order by the trial judge to keep order, the statements of killing in the courtroom, and the heinous nature of the crime all lead to a very tense and explosive security situation. These circumstances and the perceived security concerns by the Petitioner on the date in question were kept from the jury.

CONCLUSION

The petition for a writ of certiorari should be granted to secure and maintain uniformity of this Court's decisions.

Respectfully submitted,

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